In the

Supreme Court of the United States

October Term, 1950

Nos. 329-330

AMALGAMATED ASSOCIATION OF STREET, RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, ET AL.,

PETITIONERS,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD

BRIEF FOR STATE OF MICHIGAN AS *AMICUS CURIAE*

Stephen J. Roth
Attorney General of the State of Michigan

Edmund E. Shepherd
Solicitor General of the State of Michigan

Daniel J. O'Hara
Assistant Attorney General of the State of Michigan

Amicus Curiae.

FRANKLIN DE KLEINE COMPANY, STATE PRINTERS, LANSING, MICHIGAN

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Following decision by this Court in *International Union of United Automobile, Aircraft and Agricultural Implement Workers of America, C. I. O. et al.* v. *O'Brien, et al.*, 339 U.S. 454, the Legislature of Michigan amended the title and certain sections of Act No. 176 Public Acts of Michigan of 1939, as amended, dealing with the mediation of labor disputes [§ 423.1 et seq. Compiled Laws of Michigan 1948, § 15.454 (1) et seq. Michigan Statutes Annotated (Henderson) 1949 Cum Supp] and added ten new sections by Act No. 230 Public Acts of Michigan 1949 [§ 423.2 et seq. Com-

piled Laws of Michigan 1948, § 17.454 (2) et seq. Michigan Statutes Annotated (Henderson) 1949 Cum Supp.].

§ 13a (1) of said Act 230 Public Acts of Michigan 1949 provides:

"In case of any labor dispute involving hospital or public utility employes the following procedure shall be followed.

"(2). Disputes for which a settlement procedure is provided in a collective agreement between a hospital or public utility employer and a labor organization shall be handled in accordance with such procedure, or, if such procedure does not terminate in voluntary arbitration or does not result in settlement, then in accordance with the procedure provided in subsection (3) of this section.

"(3). Disputes concerning wages, hours, or other terms or conditions of employment, or concerning the interpretation or application of a collective agreement, which are not settled pursuant to the procedure, if any, provided for such settlement in a collective agreement or in a separate agreement between a hospital or public utility employer and a labor organization, shall be handled and settled in accordance with the following procedure:

"(a). The board shall intervene and investigate such dispute to determine whether the parties have engaged in collective bargaining as herein defined. The parties to a hospital or public utility dispute shall be obligated under this act to bargain collectively at all times. The parties shall be under a further obligation to participate actively and in good faith in the mediation of such dispute by the board.

"(b). The board shall also, if at any time it concludes that the parties may not be able to settle their disputes by bargaining, mediation and conciliation, urge upon the parties that they submit the same to arbitration pursuant to section 9d of this act. If, within 30 days following the notice to the board, the dispute has not been resolved, or submitted to voluntary arbitration, the board forthwith shall certify such dispute to the governor.

"(c). The governor shall cause the dispute to be submitted to a special commission as provided in section 13b of this act."

Sections 13b, 13c, 13d, 13e, 13f, and 13g of said Act No 230 Public Acts of Michigan, 1949, covers appointment and procedure of the special commission, hearings, powers of commission, provisions governing evidence, report filed with Governor, changing wages during proceedings, unlawful conduct, injunction, and penalty. These sections are printed in the appendix.

The Supreme Court of Michigan in the case of *Local 170, Transport Workers Union of America* v. *Genesee Circuit Judge*, 322 Mich 332, held that the provision of the statute creating a board for compulsory arbitration of labor disputes, of which a circuit judge shall be a member and the chairman, was void and unconstitutional as an attempt to confer upon a judicial officer nonjudicial powers and duties in violation of the provisions of the Constitution requiring a separation of the powers of government. In this case while not necessary to decision Mr. Justice Bushnell comprehensively discusses the basic issues involved in public utility strikes and we invite this Court's attention to the scholarly discussion of the deep issues involved where strikes occur in the public utility field.

By constitutional provision in Michigan municipalities may own and operate public utilities. Article VIII, § 23, Constitution of Michigan 1908, Vol 1 Michigan Statutes Annotated (Henderson) page 391, reads as follows;

> "Subject to the provisions of this constitution, any city or village may acquire, own and operate, either within or without its corporate limits, public utilities for supplying water, light, heat, power and transportation to the municipality and the inhabitants thereof: and may also sell and deliver water, heat, power and light without its corporate limits to an amount not exceeding twenty-five per cent of that furnished by it within the corporate limits; and may operate transportation lines without the municipality within such limits as may be prescribed by law: *Provided*, That the right to own or operate transportation facilities shall not extend to any city or village of less than twenty-five thousand inhabitants."

About eighteen cities and villages in Michigan own and operate electric light plants or artificial gas plants, See

> *Bay City* v. *Bd of Tax Administration*, 292 Mich 241, 245.

Cities are municipal corporations, deriving their powers from the State—State agencies for carrying on local municipal government, but within the range of the Constitution and the general home rule act for cities. The electors thereof may make, alter, amend, revise or repeal the charter of the city, which is the organic law of the city, and to be considered as other organic acts are considered. *Streat* v. *Vermilya*, 268 Mich 1.

As said by the Supreme Court of Michigan in the case of *City of Kalamazoo* v. *Titus*, 208 Mich 252, 261:

> "Political experiment has not yet produced, in this State, the autonomous city, — a little State within the State. We have a system of State government and the right of local self-government is, and always has been, a part of the system. We have, as we have always had, a State Constitution, the fundamental law. By it, now, as formerly, the legislative power of the state and all of it, is reposed for exercise in a legislature; save only as reserved by referendum and initiative proceedings."

Strikes in municipally owned utilities in Michigan would not create a national emergency but would strike the local citizenry a fatal blow and leave them hanging on the ropes. Strikes in privately owned utilities would have the same effect. As said in *International Union of U. A. & A.* v. *O'Brien, et al.*, supra (94 L ed 659) headnote 2:

> "The field of regulation of peaceful strikes for higher wages is occupied, and closed to concurrent state regulation, by the National Labor Relations Act, as amended by the Labor Management Relations Act (29 USC § § 141 et seq.), which expressly recognizes, qualifies, and regulates the right of strike, establishes certain prerequisites for any strike over contract termination or modification (§ 8 (d) of Labor Management Relations Act), including notices to both state and Federal mediation authorities, forbids strikes for certain objectives, and details procedures for strikes which might create a national emergency (§ 8 (b) (4) of Labor Management Relations Act)."

While sweeping claims will be made in the briefs of amici curiae to be filed in the case at bar that the decision in the

above case bars all State action in the public utility field, public or private, it is our view that this Court never intended any such result.

We like the approach of I. Herbert Rothenberg, Lecturer of Labor Law, Dickinson School of Law in the Article "What Should Be Done About Emergency Strikes," Vol LIV, No 4, Dickinson Law Review, June, 1950, 361 at p 364:

> "There can be no question that a certain strike may be classed as an emergency strike per se, with or without the benefit of executive grace. Such a strike need not be of national proportions nor need it concern the welfare of the nation as such or of any substantial part of the nation. No one could doubt that the shutting-off of the entire water supply of whole communities by a strike of employees of a privately owned waterworks would constitute a real and living emergency. Would the absence of presidential proclamation or the inapplicability of the Taft-Hartley Act's definition (Title 11, Section 206: 'a threatened or actual strike or lockout affecting an entire industry or a substantial part thereof' which 'will, if permitted to occur or continue, imperil the national health or safety',) render such an insufferable circumstance any the less an 'emergency' to the residents of the community whose first essential of life has been seized from them? Even though the strike might cross common boundary of two contiguous states and thus involve *commerce*, it would hardly fall within an honest and untortured interpretation of the act. It would therefore not fall within the act's connotation of an *emergency* strike. But would this render the actual emergency to the communities' residents any the less dangerous or acute. Nor could one persuade the seven and a half million citizens of

a metropolis like the City of New York that the paralysis of their community by a transportation strike is no *real* emergency because the language of the Taft-Hartley Act doesn't fit the circumstances neatly enough.".

And the same author at p 387 Id., says:

"Concerning the constitutionality of a measure requiring obligatory arbitration, there is ample reason to suppose that legislation which is mechanically proper would be held to be constitutional. (New Jersey Laws 1947, Chapter 38, which was declared unconstitutional in the case of *State of New Jersey* v. *Traffic Telephone Workers' Federation of New Jersey, et al.*, 16 Labor Cases para. 65, 162, 2 N. J. 335 (1949) for faulty legislative craftsmanship. The statute, however, was amended, so that this defect was cured, by the Act of 1949, Public Laws Chapter 308. In the case of *Local 170, Transport Workers Union, et al.* v. *Gadola*, 15 Labor Cases para 64, 725, 322 Mich 332 (1948) a Michigan Statute requiring obligatory arbitration in labor disputes in public utilities was declared unconstitutional because of unwarranted delegation of legislative functions to the judiciary.) The invalidation of these local statutes was not predicated upon any asserted invasion of fundamental constitutional guarantees. In light of the latter-day awareness of the Supreme Court of the acuteness of the labor problem (*Gibboney* v. *Empire Storage & Ice Company*, 336 U.S. 490) and remembering the effective role which Congressional declaration of public policy played in the recognition of the constitutionality of such legislation as the Anti-Injunction Act, the Wagner Act, the Fair Labor Standards Act and the Taft-Hartley Act, it is not unreasonable to assume that a statute which was mechanically

acceptable and which would preface the requirement of obligatory arbitration by an adequate Congressional declaration of public policy would be declared and held to be constitutional."

Donald R. Richberg in Vol 19, Labor Relations Reference Manual, Case for Restriction of Strikes by Law, 143 at p 144, puts it this way:

"It should be generally agreed that, where voluntary agreements cannot be reached and unsettled labor disputes in public utilities threaten a serious stoppage of an essential service, the parties should be required by law to submit their controversy to the binding decision of an impartial public tribunal. There should be little objection from the managers and owners of public utilities since their rates, services, and accounting are regulated by law and they are not at liberty to abandon their public obligations. There can be no sound objection from employees who are intelligent enough to understand that when they rely upon a public utility for their livelihood the public has a right to rely upon them to make every reasonable effort to maintain continuous service.

"There is no involuntary servitude which would result from denying men a right to strike. Each employee is at liberty as an individual to quit his job. He cannot be compelled to work against his will. A strike is the concerted action of employees who do not intend, or wish, to leave their employment, but who are seeking to compel the employer to continue their employment upon what they regard as more advantageous terms. When the employer is practically the agent of the public, authorized by government to render a public service, a concerted effort to compel him to yield to

private demands is almost exactly on a par with a strike of government employees against their government."

For another timely article on the question of "Compulsory Arbitration of Labor Disputes in Public Utilities" see Labor Law Journal, Vol 1, No 9, June, 1950, p. 694.

With the public holding the bag where strikes in public utilities occur, compulsory arbitration even though generally undesirable, may be justifiable. These industries supply services of vital importance to the public. In most cases the individual utility companies enjoy local monopoly, so that a strike in a particular locality will deprive the public of that locality of the services provided by the utility. A utility company has the duty of continuous operation, except where operation is impossible without continual loss, and the utility is willing to surrender its franchise entirely. *Brooks-Scanlon Co* v. *Railroad Comm.*, 251 U. S. 396; *Bullock* v. *Railroad Comm.*, 254 U. S. 513. It is certainly neither arbitrary nor unreasonable to impose on the employees of such a company a duty not to quit work in concert, but to allow their disputes to be settled by compulsory arbitration. In such a case the legislature may well say, as Mr. Justice McKenna said in *Wilson* v. *New*, 243 U. S. 332, 364, that:

"... submission to regulation is the condition which attaches to one who enters into or accepts employment in a business in which the public has an interest."

See, Compulsory Arbitration, 38 Harvard Law Review, 753, 776.

Conclusion

As said in *Queenside Hills Realty Co* v. *Saxl*, 328 U. S. 80, protection of the safety of persons is one of the traditional uses of the police power of the States and that the police power is one of the least limitable of governmental powers. If the States are to continue to perform their historic function of protecting the public welfare by on the spot alertness where grave danger to public health, peace and safety is involved, notwithstanding that in some cases the question of interstate commerce may be present, *National Labor Relations Board* v. *Kentucky Utilities Co.*, 182 F2d 810, legislation of the type enacted in Wisconsin and other States seeking to protect the public health and safety of their citizens affected by a strike in the public utility field should be sustained.

For a recent State approach to this delicate problem See

New Jersey Bell Telephone Co v. *Communication Workers of America, New Jersey Traffic Div. No 55, CIO* [New Jersey Superior Court, App Div., August 8, 1950,] and unofficially reported in 75 A2d 277-284.

Respectfully submitted,

Stephen J. Roth
Attorney General of the State of Michigan

Edmund E. Shepherd
Solicitor General of the State of Michigan

Daniel J. O'Hara
Assistant Attorney General of the State of Michigan

Amicus Curiae.

APPENDIX

Appendix

Pertinent sections of Act No 230 Public Acts of Michigan, 1949, § 423.2 et seq. Compiled Laws of Michigan, 1948, § 17.454 (2) et seq. Michigan Statutes Annotated (Henderson) 1949 Cum Supp.

Sec. 13b. A special commission under this act shall consist of 3 disinterested persons designated by the governor and 2 non-voting members 1 to be selected by each party to the dispute, to act with respect to a labor dispute. Such commission shall proceed promptly to conduct public or private informal hearings in said dispute, at which the parties shall appear and be heard, following such hearings, and in any case within 30 days after its appointment or such additional time as the governor may allow, the commission shall make written findings and recommendations with respect to the issues in the dispute, and report such findings and recommendations to the governor. A majority vote of the members of the commission shall constitute the recommendation of the commission on any matter. Such findings and recommendations shall not be binding upon the parties, but shall be made public. The costs and expenses of such a commission proceeding, including a per diem fee of $50.00 and necessary expenses for each member of the commission, shall be paid out of the general fund.

Sec. 13c. Reasonable notice of such hearings shall be given to the parties, who shall appear and be heard either in person or by counsel or other representative. Hearings shall be informal, and the rules of evidence prevailing in judicial proceedings shall not be binding. Any oral or documentary evidence and other data deemed relevant by the special commission may be received in evidence. A

transcript of the proceedings shall be taken, and for this purpose the mediation board shall supply the necessary stenographic service.

Sec. 13d. The special commission appointed under section 13b of this act shall have the power to administer oaths, require the attendance of witnesses, and the production of such books, papers, contracts, agreements, and documents as may be deemed by the special commission material to a just determination of the issues in dispute, and may for such purpose issue subpoenas. If any person shall refuse to obey such subpoena, or shall refuse to be sworn or to testify, or any witness, party or attorney is guilty of any contempt while in attendance at any hearing held hereunder, the special commission may, or the attorney general if requested shall, on its behalf invoke the aid of any circuit court within the jurisdiction of which the hearing is being held, and such court shall have jurisdiction to issue an appropriate order. Any failure to obey such order may be punished by the court as a contempt thereof.

Sec. 13e. (1). The special commission in making its report and recommendations shall consider only the evidence in the record and shall be governed by the following:

(a). When a valid contract is or was in existence defining the rights, duties, and liabilities of the parties with respect to any matter in dispute, the special commission shall have power, as to such matter, only to determine the proper interpretation and application of the relevant contract provisions;

(b). When there is no contract between the parties, or when there is a contract, but the issues, or any of them, have arisen with respect to a new contract or an amendment of an existing contract which, with respect to such

issues, is subject to reopening and has been duly reopened, the standards, if any, which have been stipulated by the parties as properly controlling with respect to any such issues shall be applied. In the absence of such stipulation, the special commission shall make just and reasonable findings and recommendations.

(2). The report and recommendations of the special commission shall be filed with the governor, together with the complete record in the case. The governor shall forthwith make such report and recommendation public and deliver a true copy of such report and recommendation to the board and to each of the parties, and the complete record shall be filed with the board. The parties shall thereupon, and for a period of 10 days following the filing with the governor of the report of the special commission, resume collective bargaining, and shall in good faith attempt to settle their disputes by this means, with the assistance of the board, and the board shall again urge the parties voluntarily to submit such disputed issues as may remain unsettled to arbitration under section 9d of this act. In the event the parties shall not reach an agreement or submit to arbitration within this period, the board shall thereupon certify this fact and the issues remaining unsettled to the governor.

Sec. 13f. During the pendency of proceedings under sections 13a to 13e hereof, existing wages, hours, and other terms and conditions of employment shall not be changed by action of either party without the consent of the other.

Sec. 13g. It shall be unlawful for a hospital or public utility employer to engage in or continue a lockout, or for a labor organization to engage in or continue a strike or other work stoppage, slowdown, or other attempt to interrupt a hospital or public utility service, before the proceed-

ings provided in sections 13a to 13e of this act have been completed, or where the same is applicable, before completion of the procedure contained in section 9c. At the request of the governor, the attorney general shall, on behalf of the people, petition any circuit court having jurisdiction for appropriate injunctive relief with respect to any such unlawful conduct. An employer or labor organization which engages in conduct in violation of such injunction shall, upon conviction thereof, be deemed guilty of contempt of court and be punished by a fine of not more than $10,000.00 for each day during which such violation occurs or continues, and any officer or agent of such employer or labor organization who instigates, aids, or abets such violation shall be subject to a fine of not more than $1,000.00 or by imprisonment for not more than 6 months, or by both such fine and such imprisonment: Provided, That nothing in this act shall be construed to require an individual employee to continue rendering labor or service without his consent or to make illegal the quitting of his employment, and no court shall have power to issue any process to compel any such employee to continue to render such labor or to remain at his place of employment without his consent.

Sec. 24. Any person who shall conspire with 1 or more other persons to violate any of the provisions of this act, violation of which is made a penal offense hereunder, shall upon conviction thereof, be deemed guilty of a misdemeanor, and punished by a fine of not to exceed $1,000.00, or by imprisonment of not to exceed 6 months, or both.